EMPLOYMENT TRIBUNALS

Claimant: Mr P White

Respondent: Polyflor Limited

HELD AT: Manchester **ON:** 6 ,7, 8, March 2017 (AM only) 9 March 2017 (In Chambers)

BEFORE: Employment Judge Ross
Mrs P A Corless
Dr H Vahranian

REPRESENTATION:

Claimant: Mr Norman, Counsel
Respondent: Ms L Quigley, Counsel

JUDGMENT

Having been sent to the parties on 15 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brought claims to the Employment Tribunal for ordinary unfair dismissal pursuant to the Employment Rights Act 1996 and disability discrimination. The disability discrimination claims were for indirect discrimination, Section 19 of the Equality Act 2010, failure to make reasonable adjustments, Section 20 - 22 of the

Equality Act 2010 and unfavourable treatment pursuant to Section 15 of the Equality Act 2010.

2. At the outset of the hearing the issues in the case were identified and agreed to be as follows. In relation to the disability discrimination claim:

Disability

2.1. was the claimant disabled for the purposes of Section 6 of the Equality Act 2010; in particular

(a) did he suffer from a physical impairment;

(b) was it long term or likely to be long term;

(c) did the impairment have a substantial adverse effect on normal day to day activities:

2.2. if the answer to the above is yes at what point did the claimant become disabled;

2.3. did the respondent have actual or constructive knowledge of the claimant's disability and if so, when.

2.4. Section 15 discrimination arising because of something in consequence of disability;

2.5. did the respondent subject the claimant to "unfavourable treatment namely

(a) in an informal absence review meeting on 12/10/15;

(b) an assessment by Dr Hussain on 5/11/15;

(c) an informal absence review on 20/11/15;

(d) a formal absence review on 1/12/15;

(e) a dismissal meeting on 1/12/15;

(f) an appeal against dismissal hearing on 17/12/15.

2.6. The claimant also relied on his dismissal as unfavourable treatment.

2.7. The next question was if the alleged treatment was unfavourable was it because of something arising in consequence of the claimant's disability namely his inability to use the roller?

2.8. If so was the treatment a proportionate means of achieving a legitimate aim.

Indirect Discrimination

3. The issues were:-

3.1. was it or did the respondent make it a mandatory requirement for Process Operatives to be able to undertake rolling;

3.2. did this constitute the application of a provision, criteria or practice (PCP) for the purposes of Section 19 of the Equality Act;

3.3. if so did the PCP put those sharing the claimant's disability at a disadvantage when compared with able bodied Process Operatives;

3.4. did it put the claimant at that disadvantage, if so, how?

3.5. if so was the PCP a proportionate means of achieving a legitimate aim.

Failure to make reasonable adjustments, Section 20 - 22 of the Equality Act

4. The issues were:

4.1. the claimant relies on the requirement for Process Operatives to roll as a "PCP". Did the respondent apply such a PCP.

4.2. If so did the PCP place the claimant at a substantial disadvantage in comparison to Process Operatives who were not disabled.

4.3. if so did the respondent take such steps as it was reasonable to take to avoid the disadvantage. The claimant relied upon:

(a) introduce and implement a formal system of rotation whereby the claimant's rolling duties were distributed to other PO's and

(b) find an alternative role for the claimant e.g. the drilling job within the respondent's business.

Unfair dismissal pursuant to the Employment Rights Act 1996

5. What was the reason for the dismissal, the respondent relied on capability which was not disputed.

6. Was the reason for dismissal fair pursuant to Section 98(4) of the Employment Rights Act 1996 i.e. did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, in particular:

(a) did the respondent reasonably consult with the claimant;

(b) did the respondent reasonably inform itself as to the true medical position as to the claimant's capabilities or not;

(c) were all reasonable alternatives to dismissal considered.

7. If the claim proceeded to remedy there were a number of other issues.

8. We heard from the claimant and a former employee and supervisor Mr John Williams. For the respondent we heard from Ms R Martino, the Dismissing Officer and Mr D Drillingcourt the Appeals Officer.

Facts

9. We find the following facts.

10. The claimant was employed by the respondents as a Process Operative. He first worked for the respondent on a temporary basis and became a permanent employee from 19th June 2007. His employment was terminated by reason of capability by letter dated 2nd December 2015, with effect from 1st December 2015 (see page 44).

11. In or around 2009 the claimant developed problems with his right wrist. He attended occupational health on 28th October 2009 (page 4) and there was a suggestion that the amount of lifting should be reduced and job rotation considered. A claim was made for personal injury by his solicitors on 11th October 2010 in relation to his right wrist. He was seen by occupational health on 20th October 2010 (page 5) and the record notes that the claimant has informed OH that his job is now being rotated every two hours following advice to management in October 2009. In November 2010 the claimant saw Dr Hussain (page 6) who noted the claimant's symptoms of right sided forearm pain had improved and he had occasional symptoms and was fit to perform his role. There is reference to job rotation being implemented.

12. On 1st April 2011 there is an entry in the claimant's GP records stating "pain in wrist flaring again".

13. The claimant said in his statement that he began experiencing pain in his right arm which spread to his left arm in December 2013.

14. He said he was absent from work in February 2014 for six weeks. We find it is likely that the claimant has become confused about dates. There is no reference in the claimant's GP notes to him being absent from work or consulting his GP in February 2014 about problems with his arms or elbows. Neither is there any record of him being absent from work at that time. The records do show that the claimant consulted his GP on 29th May 2014 where he was diagnosed with Lateral Epicondylitis of the elbow. "Repetitive movements at Polyflor factory elbow pain". There is a sick note at page 65 and no dispute that the claimant was absent from work from the 29th May 2014 to 4th July 2014. The notes are at pages 65, 66, 67. During that period the claimant was unfit for work due to Lateral Epicondylitis of the elbow.

15. We find the claimant was not absent from work for 6 weeks from February 2014.We find he was absent from work for almost 6 weeks from 29th May 2014.

16. On 10th June 2014, whilst absent from work, the claimant saw the occupational nurse- pages 9 to 10. He confirmed he was waiting for a Cortisone Injection. He had the injection on 17th June 2014 (page 80) and on his return to work saw the occupational health nurse on 15th July 2014.See pages 11 to 12. On that occasion the claimant noted the amount of time he spent on various aspects of his job.

17. The claimant was employed by the respondent as a Process Operative but the claimant himself and some of the documents describe him as a "Roller man". We find as a Process Operative (or Production Operative as he is referred to in some of the documents) the claimant carried out four main tasks in the respondent's vinyl flooring factory.

18. The claimant undertook four main roles namely guillotine operator, rolling operator, bar operator and hoist operator. He also explained that he worked on a three shift system, the shifts being 6 am to 2pm, 2pm to 10pm, and a nightshift. He explained that although the operatives rotated through this three shift pattern the Supervisor remained on a fixed shift so there was a different Supervisor for the morning shift, afternoon shift and night shift. The claimant agreed that following the personal injury claim in 2010 the respondents adopted some level of rotation of his work on the four tasks referred to above. However, he gave evidence that rotation did not always work effectively because on some shifts some employees liked their job and did not want to rotate and that sometimes when employees were absent from work due to sickness or holidays the relief operator could not carry out all four jobs in the rotation because he was not trained in those roles. He also said on other occasions if a colleague could see he was feeling pain in his arm, they offered to swop and carry out his duties on the roller.

19. For the respondent Ms Martino said that it was her understanding, having spoken to the supervisors, that rotation did take place.

20. It is not necessary for the Tribunal to determine factually to what extent when rotation took place because it is not relevant to the issues we have to decide. Those are issues for another court .It is the claimant's belief that failure of the respondent to rotate him has caused or aggravated his tennis elbow and he has a personal injury claim in connection with that allegation which was presented to the respondent on 3/9/15 by the claimant's solicitor at page 132. That claim has not been determined at the date of the Tribunal Hearing.

21. Meanwhile on 21st July 2014 after his return to work the claimant had a telephone discussion with his GP which stated that surgery on his tennis elbow is not needed but that his left elbow is "brilliant since the injection done". There is a further entry on 25th July 2014 with a further telephone encounter noting the claimant is still having problems with his tennis elbow.

22. On 7th October 2014 the claimant was reviewed by the occupational health nurse. He stated his elbow was painful, he was wearing an elbow support and he was encouraged to see his GP regarding the pain in his elbow. The occupational health nurse recommended he continued to rotate tasks. The claimant remained in work.

23. He was absent again between 16th February 2015 to the 17th April 2015. See page 68, 69, 70 and 71 for the fit notes and page 80. He was referred to occupational health and seen by the nurse on 23rd March 2015 during his absence from work. The GP record show he was seen on the 13th March 2015. He returned to work on 17th April 2015.

24. The claimant returned to work and then absent again from 7th August 2015 to the 9th November 2015. He attended his GP on 13th August 2015, see pages 79 and fit notes at page 72 to 74. On 29th September 2015 during his absence from work the claimant was seen by the occupational health nurse where it is noted that the claimant is going to have a Cortisone Injection and hopes to be fit for work after he has the injection. See pages 17 to 18

25. On 8th October 2015 having been absent from work since 7th August the claimant was invited to an informal absence review meeting, see page 19. The meeting takes place on 12th October 2015 see page 21. It is noted that a review appointment with occupational health is to be arranged following the claimant's Cortisone Injection. The claimant was asked whether his GP had given him any advice regarding his job. The notes record "Paul replied that his GP has recommended that Paul change his jobs". There was a factual dispute between the parties as to what this meant. It was the claimant's evidence that he was referring to the claimant changing jobs within the factory. The respondent said they understood this to mean that the claimant's GP had advised him to work elsewhere. The factual dispute is not relevant to the issues we have to decide.

26. There was also a discussion about shift rotation. The claimant was sent the notes of the meeting (see page 22). An appointment was arranged with occupational health by letter dated 28th October 2015 (see page 23) and the claimant attended on 5th November 2015. This time the claimant was seen by an occupational health physician not the occupational nurse.

27. Dr Hussain in the section of the report entitled "current position" incorrectly stated that the claimant was absent from work for six weeks in February 2014. We find it is likely that this information came from the claimant and is the same mistake as was in his statement. In fact the claimant was absent from work for almost six weeks from May 2014 rather than February. Dr Hussain narrates the rest of the history in terms of the claimant's further absences. Dr Hussain concluded the claimant was fit to return to some form of work. However he stated "it seems to me that based on the history available he does develop symptoms whenever he performs work that involves repetitive use of his elbows, manual type work with elbow/arm strain or physical type work affecting his arms". He goes on to state at paragraph four "I do not think he is fit to perform manual work, work that requires repetitive elbow movements or work that requires force such that the force is transmitted through the elbow joints. Within the setting at Polyflor I am familiar with the type of work that individuals are required to perform and it is difficult for me to see what type of work he could perform on site. Perhaps management could look into whether there are any non-manual tasks available that he could perform".

28. By this point, after receiving the cortisone injection the claimant has informed Dr Hussain that at that point in time he was "able to do all his normal day to day activities, he had a very good range of movement of his elbow today with good function". This is consistent with the evidence the claimant gave under cross examination that after the cortisone injection he had a good range of movement in his elbow.

29. On 9th November 2015 the claimant returned to work. The claimant had signed a document at page 28 saying that he was fully recovered and able to work in all areas. His GP had said he was fit to return. We refer to the note from a supervisor John Manchester in the bundle at page 27. He asked the claimant to go and see Ms Martino. Although the claimant considered he was well enough to work and his GP had permitted him to return, given the contents of Dr Hussain's report that the claimant was unfit for any manual work within the factory we find Ms Martino asked the claimant to go home. Given the conflict between these different opinions Ms Martino sent the claimant home because she relied on the evidence of the OH physician who had knowledge of the respondent's factory whilst the matter was investigated further.

30. We find that there was an informal absence review meeting on 13th November 2015. The claimant was present together with his union representative Mr Philipson and Ms Martino for the respondent. The claimant informed the respondent that he believed he could do 95% of jobs and the only job that he could not do was rolling. There was a discussion about rotation. The claimant told the respondent his GP said he could do manual work. Ms Martino explained that in her view Dr Hussain the occupational health doctor could override the GP. She explained Dr Hussain had made a site visit and looked at manual jobs in the factory prior to seeing the claimant.

31. There was a further absence review meeting on the 20th November 2015, see page 33 to 34. Once again the claimant and his union representative Mr Philipson were present as was Ms Martino. The claimant re-iterated he believed he could do 95% of jobs on site. Ms Martino referred to Dr Hussain's report. She asked the claimant whether there were any other jobs in the respondent's factory which he thought he could do and the claimant suggested a drilling job(a job for which there as a vacancy)

32. Ms Martino said she would look into this and that she would also look into any non-manual jobs but she believed there were currently no vacancies for non – annual roles. There was a discussion about rotation.

33. We find that on 24th November 2015 (see page 35) Ms Martino watched a demonstration for the drilling job. The claimant agreed in cross examination that the drilling job was a manual job although he said at Tribunal that he believed it was a lighter job and involved different arm movements.

34. The claimant by letter of 27th November 2015 page 36, was invited to a formal meeting on Tuesday 1st December 2015. In that letter he was warned that if the respondent was unable to find suitable alternative employment for him or make

reasonable adjustments they would have no option but to terminate his employment on grounds of capability.

35. Present at the meeting on 1st December were the claimant, his union representative Mr Philipson and Ms Martino. Ms Martino gave a detailed description to the claimant of the drilling role. She asked the claimant if he had any questions. She then went on to say she had looked at non-manual jobs but there were none available at either site.

36. The claimant re-iterated that he disagreed with Dr Hussain. He stated that he believed his GP said he could do 90% of jobs in the factory. The claimant said he could do any job apart from the roller where there was continual tension on his arm. The claimant did not produce any evidence from his GP at this meeting.

37. The outcome of the meeting is at page 44 to 45 of the bundle. Ms Martino dismissed the claimant by reason of capability.

38. She relied on the fact that as stated at page 38 at the dismissal meeting that Dr Hussain had said that the claimant was fit for some form of work but he did not think that the claimant was fit to perform manual work, work that required repetitive elbow movements or work that requires force such that the force is transmitted through the elbow joints.

39. The claimant appealed against his dismissal and an appeal hearing took place on the 17th December 2015, see page 47 to 50 for the notes of the hearing and the outcome letter is dated 11th January 2016, page 51 to 52. The claimant was represented at the appeal hearing by a full time trade union representative. The appeal was heard by Mr Drillingcourt. The claimant did not produce any medical evidence for the appeal hearing. He re-iterated he could do 95% of the jobs in the factory and stated that he believed he could have done the drilling job. There was a discussion about the rotation of operators on the claimant's job.

40. The claimant's union representative asked if the company would consider an independent medical assessment of the claimant given that the claimant stated his GP said he was fit for work yet Dr Hussain said he was not.

41. In the outcome letter Mr Drillingcourt rejected an independent medical assessment. He stated he considered Dr Hussain to be independent and noted he was a Specialist Accredited Occupational Physician who had visited the factory and knew what the claimant's role involved. He stated he believed the company was entitled to rely on his report. He further stated that in his opinion the claimant's account of his own GP and Dr Hussain's opinion were not inconsistent. He stated that the claimant may be fit to work but not in one of the roles that the company required of him namely Process Operative.

42. In terms of an alternative position he re-iterated that there were none that would not involve some manual element and as such the further risk of injury to the claimant if he was placed in such a manual role. Accordingly the claimant's appeal was unsuccessful.

Applying the law to the facts

43. We turn to apply the law to the facts. We were presented with a number of cases from each Counsel. The claimant's Counsel relied upon Schenker Rail UK Limited -v- Mr J Doolan Appeal Number UKEAT 0053/09 and McAdie -v- Bank of Scotland 2007 EWCA CIV 806. The claimant's representative relied upon Secretary of State for Work and Pensions -v- Higgins 2014 ICR 341, Coxall -v- Goodyear Great Britain Limited 2002 EWCA CIV 1010 and Swift -v- The Chief Constable of Wiltshire Constabulary IRLR 2004 540.

44. We turned to deal with the first issue.

(1) Was the claimant disabled for the purposes of Section 6 of the Equality Act 2010. In particular:

(a) did he suffer from a physical impairment;

(b) was it long term or likely to be long term;

(c) did the impairment have a substantial adverse effect on normal day to day activities.

45. We find that the claimant was a disabled person for the purposes of Section 6 of the Equality Act 2010. The impairment is left elbow Lateral Epicondylitis also known as Tennis Elbow. We find that the claimant had absences from work with this condition firstly from 29th May 2014 until 4th July 2014, a period of approximately six weeks. During this absence he had an injection to the left elbow. He remained at work until 16th February 2015 when he was absent until 17th April 2015, a period of eight to nine weeks. He then returned to work and was further absent from 7th August 2015 until 9th November 2015 a period of thirteen weeks. In late October, during this absence from work, he had a further cortisone injection into his left elbow which helped considerably.

46. We turn to consider whether the impairment had a substantial adverse effect on the claimant's normal day to day activities. We find that it did during specific periods. We find there is no doubt that it had a serious adverse effect on the claimant's ability to carry out day to day activities during each of the three periods of absence referred to above. We find that during those periods of absence as well as not being able to carry out his work, a crucial part of his day to day activities he had difficulty with personal care and the other matters referred to at paragraph 13 of his statement. We find no significance in the fact that the claimant did not specifically complain in detail of the nature of his difficulties to his GP or his occupational health doctor. We find that time with medical practitioners is limited and it is unsurprising that the claimant was complaining to his GP and to the Occupational Health Physician primarily about his work because it is likely to have been a matter uppermost and most significant in his mind, rather than the limitations in carrying out personal care and daily household chores.

47. We find that the claimant's condition was likely to recur. We remind ourselves that if an impairment has had a substantial adverse on a person's ability to carry out normal day to day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. We refer to paragraph 2(2) of Schedule 1 of the Equality Act 2010 and the Guidance on the definition of Disability 2011 at paragraph C6. We also reminded ourselves of the guidance in Swift -v- Chief Constable of Wiltshire which states effects are long term if they are likely to re-occur beyond twelve months if the adverse effects that are likely to re-occur are substantial.

48. We turn to the medical evidence. Although the evidence of Dr Hussain does not say that the claimant was disabled person within the meaning of the Equality Act 2010 (in fact he says the opposite) nevertheless he says "the claimant developed symptoms whenever he performs work that involves repetitive use of his elbows, manual type work with elbows/arm strain or physical type work affecting his arms".

49. We find the GP in a letter of June 2016 refers to the claimant's condition "flaring up" as does Dr Hussain in his report: "his left arm had flared up again recently". We rely on the claimant's attendance at occupational health between his absences from work on 7th October 2014 when he was wearing an elbow support bandage and had told the occupational health nurse that his left elbow was painful to find he had symptoms of his impairment between absences from work, albeit at a less severe level. The claimant conceded in cross examination that his symptoms were worse during the acute episodes of tennis elbow but that particularly after the second injection he felt a great deal better.

50. We have already found that the impairment had a substantial adverse effect on the claimant's activities normal day to day activities during the three acute periods which caused the claimant to be absent from work for 3 lengthy periods between 29th May 2014 and date of his termination of employment. These periods were 29th May 2014 to 4th July 2014, 16th February 2015 to the 17th April 2015 and 7th August 2015 to the 9th November 2015. The Tribunal finds the claimant had some symptoms between these acute periods. This is consistent with his evidence to occupational health in October 2014.

51. The Tribunal turned to consider whether the impairment was long term or likely to be long term. In doing that we had to consider whether it was likely to recur. Given that Dr Hussain stated that the claimant was not fit to perform manual work, work that requires repetitive elbow movements or work that requires force such that the force is transmitted through the elbow joints, we find that that is entirely implicit in this advice that there was a very substantial risk the condition of tennis elbow would recur if the claimant went back to work in such a job. We are satisfied that Dr Hussain is referring to a substantial adverse effect on the claimant because it affected him being able to work. Dr Hussain did not suggest this advice was time limited in any way. It appears to be permanent.

52. We find a recurring condition is consistent with the description of a "flare up" by the claimant's own GP and Dr Hussain.

53. We find, relying on the evidence of Dr Hussain that the impairment had a substantial effect on the claimant's day to day activities and was likely to recur.

Accordingly we find the claimant was a disabled person within the meaning of the Equality Act

54. We turn to the issue of date of disability.We find the risk was that it was likely to occur beyond twelve months was from when the condition first developed which was 29th May 2014. We find the claimant became disabled in May 2014 when the condition was sufficiently serious to require him to become absent from work.

55. We turned to the third question. Did the respondent have actual or constructive knowledge of the disability and if so, when. We find that the respondent did not have actual knowledge of the claimant's disability but we find by 9th November 2015 that the respondent had constructive knowledge of the claimant's disability.

56. By that date the respondent had the report from Dr Hussain. Although Dr Hussain says the claimant was not a disabled person within the meaning of the Equality Act he nevertheless states that the claimant is not fit for manual work with the respondent. The respondent knew that the claimant had had absences from work due to his left elbow of increasing periods of time and we also rely on the letter to the claimant inviting him to the dismissal hearing which warned he was at risk of dismissal and stated "if we are unable to find you suitable alternative work or make reasonable adjustments we may have no option but to terminate your employment". We find the reference to reasonable adjustments together with the fact the respondent had Dr Hussain's report which warned he was not fit for manual work together with the fact the respondent had effectively suspended the claimant on medical grounds by sending him home on 9th November are factors to suggest they had constructive knowledge of his disability.

57. We turn to deal with the claimant's claims. We turn first to the Section 15 Equality Act claim. The first issue is did the respondent subject the claimant to unfavourable treatment namely:

(a) an informal absence review meeting on 12th October 2015;

(b) an assessment by Dr Hussain on 5th November 2015;

(c) an informal absence review on 20th November 2015;

(d) a formal absence review on 1st December 2015;

(e) dismissal on 1/12/15

(f) appeal hearing on 17th December 2015.

58. The Tribunal has considered items (a) to (f) together and dealt with dismissal (e) separately. The first question is did the informal absence review meeting on 12th October 2015 amount to unfavourable treatment. We are not satisfied it did. The claimant in cross examination accepted that it was perfectly proper given that on 12th October 2015 he had been absent from work since 7th August 2015, it was reasonable for the respondents in accordance with their absence management

policy to invite him to a meeting to discuss how he was and be kept up to date about his condition. It was at that meeting at page 21 that the claimant informed the respondent he was having a cortisone injection on Friday 16th October. We rely on the evidence of the respondent that following the cortisone injection the respondent referred the claimant to their Occupational Health Physician (rather than to the Nurse who had seen him previously) so that an authorative full report of the up to date position could be obtained. Accordingly we find there was no unfavourable treatment in relation to that meeting.

59. We turn to (b), the assessment by Dr Hussain on 5th November 2015. We find that this cannot amount to unfavourable treatment. We find it is perfectly proper for an employer to refer an employee who has been absent from work for a number of weeks to an occupational health doctor. The claimant agreed in cross examination that this was not unreasonable. Accordingly we find there was no unfavourable treatment in relation to that assessment.

60. We turn to (c) the informal absence review meeting on 20th November 2015 at page 33. The claimant had no objection to the way that meeting was conducted. He was represented by his trade union representative. We find there was a proper discussion about alternative work in that meeting. Accordingly we find there was no unfavourable treatment in relation to that meeting

61. We turn to (d) the formal absence review meeting on 1st December 2015 we find that that meeting was properly conducted. Once again the claimant was represented by his trade union representative. We find that the claimant prior to the meeting had received the notes of the previous meeting and had received Dr Hussain's report. There was a proper discussion at the meeting in terms of alternative work. Accordingly the Tribunal is not satisfied there was anything unfavourable about the meeting.

62. Finally (f) the appeal hearing. The Tribunal is satisfied that Dr Drillingcourt listened to the claimant and properly conducted the appeal hearing and there was nothing about the way it was conducted which was unfavourable.Accordingly the Tribunal is not satisfied there was anything unfavourable about the meeting.

63. It is the claimant's case that his tennis elbow either was caused or aggravated by the respondent's working practices and accordingly he suffered unfavourable treatment by being asked to any meetings at all or being referred to occupational health because this all stemmed from the blameworthy conduct of the respondent and if they had not conducted themselves in a blameworthy way then there would have been no need for the meetings.

64. Firstly we find that this is a misconception but even if we are wrong about that and the claimant can show that items (a)-(f) are unfavourable treatment which arose in consequence of his disability namely his inability to use the roller we must turn to the last issue, was the treatment a proportionate means of achieving a legitimate aim.

65. We find it was the respondent's legitimate aim to maintain the health and safety of employees as well as the efficient operation of the manufacturing process. We find it is proportionate for the employer to follow an appropriate procedure to monitor the absences of employee absent from work because of illness. It is right and proper for the respondent to keep in touch and conduct a review meetings with an employee who is absent on ill health grounds. It is right and proper for an employer to refer an employee who has been absent from work to their occupational health doctor when balancing the aim of to maintain the health and safety of employees as well as the efficient operation of the manufacturing process as against the discriminatory treatment of dismissal. Where an employer has suspended an employee on medical grounds because of their own medical evidence saying he is unfit for work it must be proper to conduct a review hearing and ultimately when the claimant was dismissed to conduct an appeal hearing. Therefore these claims cannot succeed.

66. We turn to deal with the claimant's dismissal, item (e). It is undisputed that his dismissal amounted to unfavourable treatment. We find that it did arise "because of something in consequence of the claimant's disability". The claimant was unable to carry out manual work, on the basis of Dr Hussain's report and that was the reason for his dismissal.

67. We must then turn to consider whether the treatment was a proportionate means of achieving a legitimate aim. We find that the respondent can show it was. We find that it was legitimate aim to maintain the health and safety of employees as well as the efficient operation of the manufacturing process. When the respondent received the medical evidence from Dr Hussain it considered alternative work but there were no non-manual jobs available. It considered the drilling job suggested by the claimant. We find the respondent properly considered that job to be manual work and therefore unsuitable because of Dr Hussain's medical evidence.

68. We find that the claimant said on 9th November that he was fit to work and that his GP said he was fit to work. We find the claimant's GP had signed him fit on 9th November 2015. However the entry in the GP records the next day when the claimant made a telephone call to his GP says that the claimant "needs to discuss with occupational health as they are the specialists"p79

69. When turned to consider other ways to achieve the legitimate aim. There was no non manual work available. The claimant suggested a manual role. We find it would have been foolhardy for the respondent to place the claimant into a manual job, namely the drilling job when it had medical evidence from its occupational health doctor who had looked at the workplace and said the claimant would be at risk if placed at manual role. Accordingly we find the respondent has shown neither of these alternatives were a proportionate means of achieving their legitimate aim.

70. The claimant at appeal suggested an independent medical expert should consider whether he was fit for work on the basis there was a conflict between his GP and Dr Hussain.

71. We rely on Mr Drillingcourt's evidence to find in reality there was no conflict because the entry on p79 makes it clear that the GP accepts Dr Hussain is "the specialist". We find when balancing their legitimate aim against the discriminatory

conduct of dismissal the respondent has satisfied us that Dr Hussain was familiar with the claimant's workplace and the machinery on which he worked as well as being medically qualified and therefore was in the best position to offer an informed opinion of whether the claimant was fit to work. Accordingly an independent medical report was not a proportionate means of achieving the legitimate aim by a less discriminatory route.

72. Therefore we find dismissal was a proportionate means of achieving a legitimate aim.

73. We turn to the claim for the failure to make reasonable adjustments. We reminded ourselves of the relevant law, in particular the Environment Agency -v- Rowan 2008 ICR which says we must identify the PCP, any non-disabled comparators where relevant and the nature and extent of the substantial disadvantage. We remind ourselves of the burden of proof in Project Management -v- Latif 2007 IRLR 579. The onus is on the claimant to identify the nature of the adjustment that would ameliorate the substantial disadvantage. The burden then shifts to the employer to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one to make.

74. The first issue is what is the PCP. The claimant in his claim form relied on a requirement for Process Operatives to roll. We find it is factually incorrect that the respondent required all Process Operatives to role. We heard evidence from the claimant that some operators on his shift were not trained to operate the roller and therefore did not operate it and did not roll.

75. We find that the respondent did apply a provision, criteria or practice to the claimant who was a Process Operative that he was required to roll. We rely on our findings of fact that the tasks required of the claimant, a Process Operative were Guillotine Operator, Rolling Operator, Bar Operator and Hoist Operator. We find he worked on Number 7 unit, see page 183.

76. The second question is did the PCP -the requirement for him to roll put the claimant, a disabled person, at a substantial disadvantage in relation to a relevant matter. We find that the claimant was put at a substantial disadvantage in relation to a relevant matter. The substantial disadvantage was that he was ultimately dismissed because the respondent had medical evidence from the occupational health doctor Dr Hussain saying that he was not fit to perform manual work, work that required repetitive elbow movements or work that required force such that the force was transmitted through the elbow joints, see page 25.

77. The Tribunal reminded ourselves of the Code of Practice on Employment 2011 and the factors we may take into account.(See paragraph 6.28) We also reminded ourselves of the burden of proof s139 Equality Act 2010.

78. We turned to consider the first proposed adjustment of "introducing and implementing a formal system of rotation whereby the claimant's duties were distributed to other employees". We turned first to consider whether this would ameliorate the substantial disadvantage. We find it would not.

79. Dr Hussain's report states that the claimant was not fit to carry out any manual work and accordingly he was not fit to carry out the other tasks in the rotation which the claimant agreed in cross examination were manual tasks. In fact in 2014 (see page 11) the claimant had agreed that the manipulator and the guillotine as well as the roller exerted the most pressure on his elbows. Accordingly we find it was not a reasonable adjustment because it would still put the claimant at risk, based on the respondent's occupational health report.

80. Even if we are wrong about that we find that transferring the roller duties to the three other individuals in the rotation for this job would expose those other employees to an increased foreseeable risk of injury and accordingly that reason would not be a reasonable step for the employer to take. For these reasons the respondent has satisfied us it was not reasonable for the respondent to make that adjustment.

81. We turn to the other proposed adjustment, finding an alternative role for the claimant for example the drilling job.

82. The claimant did not at his dismissal hearing or at the appeal hearing identify any non-manual role for which he was suitable. The respondent said at the time that they had no non-manual role available. This was not subject to challenge at the disciplinary or appeal hearing or at the Tribunal.

83. So far as an alternative manual role is concerned the Tribunal finds that it was not reasonable to transfer the claimant into the drilling job because the respondent had medical evidence to say that the claimant should not undertake a manual role. In fact it would have been foolhardy for the respondent to place the claimant into a manual job when it had medical evidence from its occupational health doctor who had looked at the workplace and said the claimant would be at risk if placed in a manual role. Therefore the claim for failure to make reasonable adjustments does not succeed.

84. We turn to the claim for indirect discrimination pursuant to Section 19 of the Equality Act 2010. We rely on the provision, criteria or practice expressed in the same way as in the reasonable adjustments claim. We find the PCP put those sharing the claimant's disability at a disadvantage with compared with others in that role but who were able bodied. It put the claimant at a disadvantage because it meant he was unable to do his job and ultimately was dismissed.

85. We turn to consider whether dismissal was a proportionate means of achieving a legitimate aim. We found it was. We rely on the fact that the respondent had a legitimate aim to maintain the health and safety of their employees as well as the efficient operation of the manufacturing process. The respondent had a report from Dr Hussain saying the claimant was at risk if he was returned to a manual job. There was no non-manual job available. For the reasons explained above the respondent was entitled to rely on Dr Hussain rather than instructing an independent expert. Accordingly dismissal was a proportionate means of achieving a legitimate aim. Accordingly this claim fails.

86. We turn to the claim for ordinary unfair dismissal pursuant to Section 95 and Section 98 of the Employment Rights Act 1996. The first issue is what is the reason for dismissal, the respondent relies on capability as the reason. We find that the dismissing officer and the appeals officer relied on the evidence of Dr Hussain that the claimant was not fit to return to manual work within the factory and accordingly we find that capability was the reason for the dismissal.

87. We turn to consider whether the dismissal was fair or unfair within the meaning of Section 98(4) of the Employment Rights Act 1996. We remind ourselves of the guidance in East Lindsey District Council -v- Daubney 1977 IRLR 1981 namely that there should be consultation with the claimant and that the respondent should take steps to discover the true medical position and consider alternative work.

88. The claimant drew our attention to the cases of Schenker Rail UK Limited -v- Doolan and McAdie -v- Royal Bank of Scotland. We find that Schenker is authority for the well known proposition that the Employment Tribunal must not substitute its own view for that of the employer. The test is whether a reasonable employer of this size and undertaking could have dismissed this employee for capability. We find McAdie is authority for the principle that where an employee has been injured as a result of the employer's fault the employer may go the "extra mile" before dismissing.

89. We turned to consider the issue of consultation. We find the respondent reasonably consulted with the claimant. We rely on the fact that there were meetings on 12th October, 13th November, 20th November and 1st December 2015 where the claimant was consulted about his medical condition. We find that when the claimant raised the drilling job with Ms Martino she looked into it as suggested (see page 35) and discussed it with the claimant at the hearing on 1st December (see page 37) but he asked no questions about it. We find that Ms Martino noted that it was a manual job and in those circumstances although a vacant position was not suitable bearing in mind the medical evidence from Dr Hussain. We find that the respondent looked for non-manual work but there was none.

90. We turn to the medical issue. We find the respondent was entitled to rely on the occupational health report, particularly as Dr Hussain was noted to have visited the factory and viewed the type of work the claimant performed, see page 24. The claimant who was a trade union health and safety representative and was represented by the union both at his dismissal hearing and by a full time trade union representative at the appeal hearing ,did not provide any medical evidence to the employer to contradict Dr Hussain. Instead, the claimant asserted that his GP had said he was fit for work (although this was not known to the employer at the time, in fact his GP noted see page 79: “needs to discuss this with occupational health as they are the specialists”).

91. We find at the appeal stage the claimant's representative requested an independent medical expert report be obtained which we find Mr Drillingcourt reasonably used for the reasons set out in his letter, namely that the company was entitled to rely on Dr Hussain's report, given he had visited the factory and knew what the claimant's role involved.

92. We find that having consulted with the claimant, relied on an independent report from the occupational health physician who said the claimant was unfit for manual work and having considered alternative work but found there was none available that dismissal was within the band of reasonable responses of a reasonable employer. Insofar as the respondent was required to go the "extra mile" because the claimant perceived his condition was caused by his work we make the following findings.

93. Firstly, there is an ongoing personal injury claim in relation to this matter and it is not the function of this Tribunal to identify whether or not the respondent negligently caused or contributed to the claimants' personal injury. We have neither the jurisdiction nor the evidence to determine such a claim. Secondly, even putting the matter at its highest, in other words that the claimant believes he had suffered a resurgence of his tennis elbow condition due to the respondent's actions, it is difficult to see what "extra mile" the respondent might reasonably have run. They were faced with the fact that Dr Hussain an occupational health physician said he was not fit for manual work at the respondent's workplace and it was undisputed that there were no non-manual jobs available.

94. The Royal Bank of Scotland v Mcadie 2008 ICR 1087, CA reminds us that there cannot be a situation where an employer is precluded from effecting a fair dismissal even if the employer is culpable. In addition we have the authority of Coxall -v- Goodyear Great Britain Limited 2002 EWCA Civ 1010 to remind us that an employer who returns an employee to work into a role for which medical advice says he is unsuitable may be successfully sued for negligence.

95. Therefore bearing in mind it is not for us to substitute our own view of what we would have done, given the nature of the medical evidence before the employer, we find that the dismissal was within the band of reasonable responses of a reasonable employer of this size and undertaking and accordingly the claimant's claim must fail.

Employment Judge Ross

21 March 2017

REASONS SENT TO THE PARTIES ON

23 March 2017

FOR THE SECRETARY OF THE TRIBUNALS